Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

JESUS BOTELLO CERVANTES,
Petitioner,

v.

THEO WHITE, WARDEN,
CALIFORNIA STATE PRISON AT FOLSOM,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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YOPP

QUESTIONS PRESENTED

In a trial that lasted *less than two hours*, petitioner was convicted of murder. His sole defense was that he was in Mexico at the time the crime occurred. There are numerous witnesses in Mexico who informed a defense investigator that petitioner was in Mexico when the crime occurred, and that they were willing to testify at trial. However, none of them were called to testify. At trial, when petitioner asked his counsel why these witnesses were not being called, defense counsel told petitioner that the witnesses in Mexico had refused to testify. The alibi witnesses deny ever being contacted by defense counsel, and they expressly deny having refused to testify.

This Petition raises the following questions:

(1) Was petitioner deprived of his right to effective representation when his defense counsel failed to call alibi witnesses at trial?

(2) Should a certificate of probable cause be issued so that petitioner can present his appeal to the United States Court of Appeals for the Ninth Circuit?

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---

PETITION FOR WRIT OF CERTIORARI

Petitioner Jesus Botello Cervantes hereby petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit in this case. The Ninth Circuit denied petitioner's request for issuance of a certificate of probable cause, even though petitioner has

advanced sworn affidavits establishing that his defense counsel lied about the purported unavailability of alibi witnesses who may have exculpated petitioner. Through this Petition, petitioner seeks an order directing the Ninth Circuit to issue a certificate of probable cause.

OPINIONS BELOW

There are no published opinions. The request for issuance of a certificate of probable cause, and the subsequent motion for rehearing, were denied in minute orders.

JURISDICTION

On January 11, 1996, the Ninth Circuit denied petitioner's request for issuance of a certificate of probable cause. Petitioner filed a timely motion for rehearing, which was denied on February 27, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(1)(1988).

CONSTITUTIONAL PROVISION AND FEDERAL RULE INVOLVED

The Sixth Amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in

his favor, *and to have the Assistance of Counsel for his defence.*" (Emphasis added.)

Rule 22(b) of the Federal Rules of Appellate Procedure states, in relevant part: "In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of probable cause."

STATEMENT OF THE CASE

Jesus Botello Cervantes, an indigent Mexican national, is serving a term of seventeen years to life. He was convicted in 1984 of murder and attempted murder. His entire trial (including opening and closing arguments) lasted only one hour and forty-five minutes. Petitioner exhausted his state appeals and petitioned a federal court for a writ of habeas corpus. The District Court denied the writ and refused to issue a certificate of probable cause. Pursuant to 28 U.S.C. § 2253 and Rule 22(b) of the Federal Rules of Appellate Procedure, petitioner sought a certificate of probable cause from the Ninth Circuit, but that request was denied by two Ninth Circuit judges. Petitioner then requested that an *en banc* panel of the Ninth Circuit reconsider that decision. The request for rehearing *en banc* was denied by the same panel.

Petitioner was arrested in 1984 in connection with a shooting that occurred in Los Angeles on September 2, 1981. On that day, two groups of men had fought outside a bar. One man pulled out a gun and shot two brothers, Pedro

and Jesus Lopez. Pedro was killed. Jesus survived. Petitioner contends that he was in Mexico when the shooting occurred. (Petitioner's Ninth Circuit Appendix ["Ninth Cir. App."] Exh. 3 at ¶¶ 3-4.)

Petitioner was represented by court-appointed counsel, W. Raymond Newman ("defense counsel"). Petitioner only met with defense counsel three times before trial. At their first two meetings, he informed defense counsel that he was in Mexico in September of 1981, the time of the crime. Petitioner gave defense counsel a list of witnesses who could corroborate that he was in Mexico at that time. (*Id.* ¶¶ 6-7.)

An investigator was sent to Mexico to interview some of the alibi witnesses. (*Id.* ¶ 8.) The investigator spoke to several people who told him that petitioner was in Mexico at the time of the crime. The witnesses said they were willing to testify in the United States. Inexplicably, *the witnesses never heard from the investigator again, nor were they ever contacted by defense counsel.* (See Ninth Cir. App. Exhs. 9 at ¶ 4; 6 at ¶ 5; 7 at ¶ 5; and 8 at ¶ 5.)

Defense counsel misled petitioner about the unavailability of alibi witnesses. Petitioner met with defense counsel a few days before trial and asked about the alibi witnesses. *Defense counsel told him that the witnesses had refused to testify.* (Ninth Cir. App. Exh. 3 at ¶ 9.)

Petitioner's trial was held on the afternoon of October 29, 1984. The prosecution introduced only two witnesses. The first witness was the wounded brother, Jesus Lopez. He testified that as he exited a bar at 2:00 a.m., petitioner had

shot him. However, he cast serious doubt on the reliability of his testimony by admitting that he and his brothers were drunk. (Ninth Cir. App. Exh. 5(H), p. 11:21-24.) The only other prosecution witness was Jesus' other brother, Antonio. Antonio denied being drunk, but admitted that he and his brothers had been drinking all night. (*Id.* at Exh. 5(I), pp. 23:21-24:9.) There was no physical evidence linking petitioner to the crime. There was no evidence of motive.

Petitioner's sole defense was alibi. Petitioner had been deported from the United States in July 1981, approximately six weeks prior to the killing. Petitioner maintained that he remained in Mexico until January 1983. (*Id.* at 41:22-42:9.)

Although there were many potential witnesses in Mexico who could have corroborated petitioner's defense, none were called to testify. Petitioner and his wife were the only defense witnesses. Unfortunately, petitioner's wife (who at the time of the killing was a friend living in a nearby village) could not corroborate petitioner's defense because she saw petitioner "only . . . on the weekends." (*Id.* at 37:17.) After no witness corroborated petitioner's alibi, the trial court found petitioner guilty of second degree murder and attempted murder.

DEFENSE COUNSEL'S INDICTMENT

Defense counsel did nothing to prepare this case for trial. Instead, as was apparently his practice, he padded his hours to earn money for work that he did not do. He was indicted in Los Angeles County for grand theft and perjury for

submitting false bills to the court for work allegedly done as a court-appointed lawyer. The most recent charges go back to 1985. He claims to have worked over 5,000 hours in 1988 alone, and billed every single day at an average of 11.71 hours per day for over 600 days in a row from January 1988 to August 1989. (Ninth Cir. App. Exh. 5(B) at p. 2:19-23.) Defense counsel was acquitted of some of the charges, but the jury was hung on others. A previous investigation for false billing, covering the years 1983 and 1984, was settled, with defense counsel agreeing to pay $25,511 in restitution. (*Id.* Exh. 5 at ¶ 4.)

Defense counsel's billing practices had a direct impact on petitioner. Even if believed, defense counsel claims to have worked only 52 hours on petitioner's case. (Ninth Cir. App. Exh. 5 at ¶ 5.) However, the record establishes that defense counsel spent far less time on this case. For example, defense counsel claims to have worked on petitioner's case while vacationing with a woman friend in New York. The woman, Traci Ross, testified before the Los Angeles County Grand Jury that defense counsel did not do *any* legal work during that trip. (*Id.* at ¶ 7.)

PROCEDURAL HISTORY

Following his conviction, petitioner's appeal was handled by a court-appointed attorney. Petitioner told her about the alibi witnesses, and she questioned defense counsel about it. Defense counsel told her that the witnesses had refused to testify. (Ninth Cir. App. Exh. 18 at ¶ 4.)

Petitioner's appeal was denied on September 23, 1985. On March 30, 1993, a writ of habeas corpus was filed in California Superior Court. That writ was denied, as was an appeal to the California appellate court. On January 31, 1994, the California Supreme Court, in a 4-3 decision, denied petitioner's writ. Three Justices voted to issue an order to show cause.

On February 3, 1994, petitioner filed a writ of habeas corpus in the United States District Court. In an order dated May 26, 1995, the District Court dismissed the Petition without a hearing. (Writ of Certiorari Appendix Exhs. B and C.) The District Court's opinion does not address the main issue in this case — **that defense counsel lied to his client about the unavailability of alibi witnesses**. The Ninth Circuit's minute orders do not address the merits of petitioner's writ. (*Id.* Exh. A.)

REASONS FOR GRANTING THE WRIT

I. THE LOWER COURTS' REFUSAL TO ISSUE A CERTIFICATE OF PROBABLE CAUSE RAISES TO AN UNPRECEDENTED LEVEL A STATE CRIMINAL DEFENDANT'S BURDEN FOR SEEKING RELIEF IN FEDERAL COURT FOR A VIOLATION OF A DEFENDANT'S FEDERAL RIGHTS

This Court has held that a certificate of probable cause should issue where a petition for writ of habeas corpus raises issues that "are debatable among jurists of reason." *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983). Any doubts

about whether this standard has been met "are to be resolved in favor of the petitioner." *Buxton v. Collins*, 925 F.2d 816, 819 (5th Cir.), *cert. denied*, 498 U.S. 1128 (1991). The fact that three California Supreme Court Justices voted in favor of issuing an order to show cause illustrates that there are issues raised in this Petition that are, at a minimum, "debatable among jurists of reason." *Barefoot*, 463 U.S. at 893 n.4. The refusal to allow petitioner an opportunity to present the merits of his case to a full panel of the Ninth Circuit unfairly restricts a state criminal defendant's ability to seek relief in federal court for a violation of his or her rights under the Constitution of the United States.

A. Petitioner Was Denied The Effective Assistance Of Counsel Because His Counsel Lied To Him About The Availability Of Key Witnesses, Failed To Investigate Alibi Witnesses, And Did Not Procure Their Testimony For Trial

There are two requirements to a claim for ineffective assistance of counsel. "First, the defendant must show that counsel's performance was deficient." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This requires a showing that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Second, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 693-94.

Defense counsel's performance was deficient for at least two reasons: (1) he lied to his client about the purported unavailability of the alibi witnesses; and (2) he did not follow up on the fruits of the investigator's findings. Under any standard of competence, a lawyer must never lie to a client about any fact, especially the availability of key trial witnesses. When defense counsel told petitioner that the alibi witnesses were unavailable, his performance fell below "an objective standard of reasonableness." *Strickland*, 466 U.S. at 688.

Defense counsel's failure to follow up on the fruits of the investigator's trip to Mexico further deprived petitioner of his right to adequate representation.[1] Such a failure to carry through an investigation is grounds for a new trial. In *Sanders v. Ratelle*, 21 F.3d 1446 (9th Cir. 1994), the Ninth Circuit reversed a murder conviction because of the defense counsel's failure to adequately investigate the defendant's only viable defense, mistaken identity. *See also Hendricks v. Vasquez*, 974 F.2d 1099, 1109 (9th Cir. 1992) (vacating judgment where record not clear enough to "determine if counsel's decision was a strategic one, and, if so, whether the decision was a sufficiently informed one"); *United States v. Burrows*, 872 F.2d 915, 918 (9th Cir. 1989).

Moreover, even assuming *arguendo* that the alibi witnesses had expressed some reservations about coming to the

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[1] The District Court seemed impressed with the fact that defense counsel sent an investigator to Mexico. The District Court ignored the fact that defense counsel did nothing to follow up on the fruits of the investigation.

United States to testify, there are criminal procedures in California for obtaining testimony from out-of-state witnesses. Under California law, the trial court must appoint a commissioner to obtain deposition testimony from out-of-state witnesses. (*See* California Penal Code §§ 1349-1357.) A trial court's refusal to obtain such testimony is reversible error. *See People v. Lundquist*, 84 Cal. 23; 24 P. 153 (1890). Thus, even if the witnesses had refused to testify, defense counsel should have discussed this issue with petitioner, and should have obtained the testimony by deposition.

B. Petitioner Was Prejudiced By Defense Counsel's Misrepresentations And Failure To Adequately Investigate Because There Were No Witnesses At Trial Who Could Corroborate Petitioner's Only Defense

In order to obtain relief for ineffective assistance of counsel, petitioner must also show prejudice. *Strickland*, 466 U.S. at 694. Prejudice exists if there is a reasonable probability that, absent counsel's errors, the fact finder would have had a reasonable doubt respecting petitioner's guilt. *Id.* A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome." *Id.* Petitioner was prejudiced because defense counsel's failure to follow up on the fruits of the investigator's trip to Mexico deprived him of the most critical evidence supporting his only defense — alibi.

The witnesses who live in Mexico should have been called to corroborate petitioner's only defense. Had counsel investigated adequately, he could have called at least seven wit-

nesses who would have supported petitioner's defense that he was in Mexico at the time of the shooting. The testimony of these witnesses could have established petitioner's presence in Mexico. For example, Enrique Aranda, 57, recalls that in July or early August 1981, petitioner returned from the United States. On August 2, 1981, a party was held for Mr. Aranda's wife, in Ocatlan, Mexico. Mr. Aranda recalls that petitioner was at that party. He also recalls seeing petitioner regularly during September and October 1981. (Ninth Cir. App. Exh. 6 at ¶ 3.) Mr. Aranda spoke to an investigator in 1984 and informed him that he would be willing to testify. (*Id.* at ¶ 5.)

Jesus Gutierrez, 47, has known petitioner since he was a boy. He owns a store in petitioner's neighborhood. He recalls that petitioner returned to Mexico around August 3, 1981. He saw petitioner regularly between August 1981 and the beginning of 1983, when petitioner returned to the United States. He shared this information with an investigator in 1984, but was never asked to testify. (*Id.* Exh. 7 at ¶¶ 2-5.) Angelina Cervantes, 52, has known petitioner since he was twelve. She recalls petitioner being at a party on August 2, 1981. He lived with his parents during August and September 1981, and helped his father sell corn and fruits. She saw him at least twice each week on weekdays, and every Sunday at soccer games. She shared this information with an investigator, but was never asked to testify. (*Id.* Exh. 8 at ¶¶ 2-5.)

If defense counsel had followed up on the investigator's findings, he would have found other witnesses. For example,

Margarita Andrade, 67, lives near petitioner's parents. She recalls that in August 1981 petitioner returned from the United States and lived at his parent's home in Mexico until early 1983. She was never contacted by the investigator. (*Id.* Exh. 10 at ¶¶ 2-3.) Leticia Guevara, 45, has been petitioner's neighbor for many years. She recalls a big welcome party for petitioner around August 3, 1981. She saw him frequently in August and September, 1981, when petitioner was her neighbor. She also saw petitioner playing soccer for a local team during this period. She recalls that petitioner returned to the United States with his new bride in January 1983. She was never contacted by the investigator. (*Id.* Exh. 11 at ¶¶ 2-5.) Carlos Duran remembers that petitioner returned from the United States in July or August 1981. He also recalls seeing petitioner at a birthday party on August 2, 1981. He saw petitioner regularly in the town plaza. Mr. Duran recalls that from August 1981 through the end of 1981, petitioner was living with his parents and working with his father, cutting stalks and corn. Mr. Duran too recalls that petitioner returned to the United States in January 1983. (*Id.* Exh.d 12 at ¶¶ 3-7.)

The District Court dismissed these witnesses because they were family, friends, or acquaintances of petitioner. It is unfair to suggest that each of these alibi witnesses is fabricating. Questions regarding the credibility of these witnesses should be resolved by a jury.

Had these witnesses corroborated petitioner's alibi defense, it is reasonably probable that the result of the trial would have been different, especially given the intoxicated

state of the prosecution's only two witnesses. Moreover, the minimal defense effort evident from the meager two hours devoted to petitioner's trial, and defense counsel's indictment (combined with the specific evidence of his false billing *in this case*), further undermine any confidence in petitioner's conviction. For all of these reasons, petitioner should be allowed to present his case to a full panel of the Ninth Circuit.

CONCLUSION

The petition for certiorari should be granted, and a certificate of probable cause should issue.

Respectfully submitted,

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Jesus Botello Cervantes

Date: May 21, 1996

[APPENDICES]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSE BOTELLO CERVANTES,
Petitioner,

vs.

THEO WHITE, WARDEN, et al.,
Respondents.

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U.S. COURT OF APPEALS

FEB 27 1996

No. 95-56637

DC# CV-94-3130-LGB
Central California

ORDER

Before: HALL and BRUNETTI, Circuit Judges

The "motion for rehearing" is denied and, on behalf of the court, the suggestion for rehearing en banc is rejected. Gen. Ord. § 6.11.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSE BOTELLO CERVANTES,
Petitioner,

vs.

THEO WHITE, WARDEN, et al.,
Respondents.

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FILED
CLERK, U.S. DISTRICT COURT
NOV. 6, 1995
CENTRAL DISTRICT OF CALIFORNIA
BY [ILLEGIBLE] DEPUTY

Case No. CV 94-3130-LGB (RMC)

ORDER DENYING CERTIFICATE OF PROBABLE CAUSE AND ORDER TO APPEAL IN FORMA PAUPERIS

On June 19, 1995, following dismissal of his Petition for Writ of Habeas Corpus,[1] petitioner filed a Notice of Appeal to the Ninth Circuit. Petitioner has not filed a Petition for

[1] Petitioner filed Objections to the Magistrate Judge's Report and Recommendation on May 19, 1995, which were considered. The Court adopted the Magistrate Judge's Revised Report and Recommendation on May 26, 1995, dismissing the petition.

Issuance of a Certificate Cause,[2] which is necessary to perfect the appeal, or a Request to Appeal In Form Pauperis.

The Court finds that the proposed appeal from the Judgment is frivolous, without merit, and does not raise reasonably debatable issues. In the Petition for Writ of Habeas Corpus petitioner alleged the following claims: First, that petitioner had ineffective assistance of trial counsel due to inadequate investigation of petitioner's alibi defense and the waiver of the right to a jury without fully informing petitioner of the nature of the right and the consequences of waiving it. Petitioner's ineffective assistance of counsel claim is inferentially based on the length of the trial and the time spent by trial counsel in preparing for the trial, which was 52 hours.[3] Second, that petitioner did not knowingly and voluntarily waive his right to a jury trial.

Pursuant to 28 U.S.C. §§ 1915(a) and 2253, Fed. R. App. P. 22(b), and *Gardner v. Pogue*, 558 F.2d 548, 550-51 (9th Cir. 1977), the Court finds that the appeal is not taken in good faith for the reasons set forth in the Revised Report

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[2]Nevertheless, the Court will overlook petitioner's failure to file the Petition for Issuance of a Certificate of Probable Cause, and consider the matter as if it had been filed.

[3]Petitioner implies that 52 hours is an inflated figure based on Mr. Newman's indictment, in 1994, for grant theft and perjury for submitting false bills for work done as a court-appointed lawyer after petitioner's trial, during 1985 through 1989. However, Mr. Newman was not convicted; rather, a jury acquitted him of some of the charges and did not reach a verdict as to other charges.

and Recommendation of the United States Magistrate Judge filed May 26, 1995.

IT IS ORDERED that a Certificate of Probable Cause to Appeal and Order to Appeal In Forma Pauperis be denied.

DATED: November 6, 1995

/s/ LOURDES G. BAIRD
LOURDES G. BAIRD
UNITED STATES DISTRICT JUDGE

PRESENTED BY:

DATE: November 3, 1995

/s/ ROSALYN M. CHAPMAN
ROSALYN M. CHAPMAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSE BOTELLO CERVANTES,
Petitioner,

vs.

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NOV. 26, 1995
CENTRAL DISTRICT OF CALIFORNIA
BY [ILLEGIBLE] DEPUTY

Case No. CV 94-3130-LGB (RMC)

JUDGMENT

Pursuant to the Order of the Court adopting the findings, conclusions, and recommendations of the United States Magistrate Judge,

IT IS ADJUDGED that the Petition for Writ of Habeas Corpus is DENIED and the action is DISMISSED.

DATED: May 26, 1995

/s/ LOURDES G. BAIRD

LOURDES G. BAIRD
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSE BOTELLO CERVANTES,
Petitioner,

VS.

THEO WHITE, Warden, et al.,
Respondents.

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MAY 26, 1995
CENTRAL DISTRICT OF CALIFORNIA
BY [ILLEGIBLE] DEPUTY

Case No. CV 94-3130-LGB (RMC)

ORDER ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. Section 636(b)(1)(C), the Court has reviewed the Petition, all of the records and files herein and the attached Report and Recommendation of the United States Magistrate Judge. The Court concurs with and adopts the conclusions of the Magistrate Judge.

IT IS ORDERED that the Petition for Writ of Habeas Corpus is DENIED.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Magistrate Judge's Report and Recommendation and Order by the United States mail on Petitioner and counsel for Respondents.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: May 26, 1996

/s/ LOURDES G. BAIRD

LOURDES G. BAIRD
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSE BOTELLO CERVANTES,
Petitioner,

vs.

THEO WHITE, WARDEN, et al.,
Respondents.

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MAY 26
CENTRAL DISTRICT OF CALIFORNIA
BY ___[ILLEGIBLE]___ DEPUTY

Case No. CV 94-3130-LGB (RMC)

REVISED REPORT AND RECOMMENDATION ON A STATE HABEAS CORPUS PETITION

This report and recommendation is submitted to the Honorable Lourdes G. Baird, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

BACKGROUND

On October 29, 1984, Jose Botello Cervantes ("petitioner"), a California state prisoner, was convicted, follow-

ing a bench trial, of second degree murder (California Penal Code[1] § 187) and attempted second degree murder (Penal Code §§ 664 and 187). For the murder, petitioner was sentenced to prison for seventeen years to life, including a two year enhancement for the use of a firearm under Penal Code § 12022.5. Petitioner was also sentenced to ten years in prison, including two sentence enhancements totaling three years, for the attempted second degree murder, to run concurrently with the murder sentence.

Petitioner appealed the conviction to the California Court of Appeal, which affirmed the judgment on September 23, 1985. The only issue raised on appeal was whether there was sufficient evidence to convict. On March 3, 1993, petitioner filed a habeas corpus petition in Sacramento Superior Court. The case was transferred to Los Angeles Superior Court, which denied the petition on May 12, 1993. Petitioner then filed a habeas corpus petition in the California Court of Appeal, which denied the petition on June 30, 1993. Petitioner also filed a habeas corpus petition in the California Supreme Court, which denied the petition by a 4-3 vote on January 31, 1994. The issues raised in the state habeas corpus petitions are the same issues raised in the pending habeas corpus petition.

The facts underlying petitioner's conviction are, as follows: On September 1, 1981, Jesus, Antonio and Pedro

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[1]The California Penal Code is referred to throughout the Report and Recommendation as Penal Code.

Lopez[2] were with another brother, Simon Morales, and two friends in a bar. Petitioner and several of his friends were also in the bar. At 2:00 a.m. the bar closed and the Lopez brothers left. Petitioner and his friends were already outside the bar. One of petitioner's friends attacked Simon Morales, and the fray began. Jesus was cut on the hand while trying to protect Antonio. Petitioner took out a gun and shot Jesus three times. Pedro, who went to the assistance of Jesus, was also shot by petitioner. Pedro died of the gunshot wound.

At the bench trial, which lasted less than two hours, Antonio testified that petitioner was the person who shot Jesus and Pedro. The prosecutor and defense counsel stipulated that Jesus's testimony from the April 9, 1984, preliminary hearing would be admitted into evidence as direct evidence. At the preliminary hearing, Jesus had testified that petitioner shot him and Pedro. Jesus had previously identified petitioner at a photographic showup in 1981. Jesus had further testified at the preliminary hearing that he had seen petitioner in the bar on previous occasions.

Petitioner's defense counsel was Walter Raymond Newman. He presented an alibi defense for petitioner. Petitioner and his wife both testified that petitioner was in Mexico at the time of the shootings. Petitioner testified that he was deported from the United States in July 1981 and did not return until January 1983. No other alibi witnesses were called to testify.

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[2]For clarity, each Lopez brother is referred to by his first name.

PETITIONER'S CONTENTIONS

The pending habeas corpus petition was filed on February 3, 1994, in the United States District Court for the Eastern District of California. It was transferred to the United States District Court for the Central District of California on April 11, 1994. Respondent filed his answer or return on July 21, 1994, and petitioner filed a traverse on August 5, 1994.

The Petition for a Writ of Habeas Corpus challenges petitioner's conviction on two primary grounds. The first ground is that petitioner had ineffective assistance of trial counsel. (Pet.[3] pp.9-17, 19-21). Specifically, trial counsel's assistance is alleged to have been ineffective due to: (1) inadequate investigation of petitioner's alibi defense; and (2) waiver of the right to a jury without fully informing petitioner of the nature of the right and the consequences of waiving it. Petitioner's ineffective assistance of counsel claim is inferentially based on the length or the trial and the time spent by trial counsel in preparing for the trial, which was 52 hours.[4] Petitioner seeks an evidentiary hearing on this ground. The second ground is that petitioner did not

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[3]"Pet." refers to petitioner's memorandum of points and authorities.

[4]Petitioner implies that 52 hours is an inflated figure based on Mr. Newman's indictment, in 1994, for grand theft and perjury for submitting false bills for work done as a court-appointed lawyer after petitioner's trial, during 1985 through 1989. However, Mr. Newman was not convicted; rather, a jury acquitted him of some of the charges and did not reach a verdict as to other charges.

knowingly and voluntarily waive his right to a jury trial. (Pet. pp.17-19).

DISCUSSION

Let us now examine petitioner's claims to determine whether they have merit.

1. Ineffective Assistance of Counsel:

Petitioner claims that there are several alibi witnesses who saw him in Ocatlan Mexico, during the same time period as the murders, and defense counsel's failure to call these witnesses to testify constitutes ineffective assistance of counsel. In support of his contentions, petitioner has provided declarations from seven proffered witnesses, including petitioner's mother. (*See* Petitioner's Appendix, Exh. 6-12).

Four of the proffered witnesses were located by defense counsel's investigator when he visited Mexico as part of the defense investigation prior to trial. While arguably bolstering petitioner's alibi, the testimony of the proffered witnesses is to the effect that petitioner was in Ocatlan, Mexico, between July 1981 and January 1983. None of them specifically avers that petitioner was in Mexico on August 31, – September 1, 1981, the day of the murder. Additionally, none swears that he or she was available at the time of the trial to come to the United States to testify.[5] Moreover, the proffered witnesses

[5] In fact, Enrique Duran Aranda declares that, in 1984, he told the investigator that he had no passport and both he and his wife, Angelina

are long-standing friends and neighbors of petitioner and his family, who reside in petitioner's village.

To establish a *prima facie* claim of ineffective assistance of counsel, petitioner must demonstrate that trial counsel's performance was deficient and that the deficient performance prejudiced the defence. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *James v. Borg*, 24 F.3d 20, 27-8 (9th Cir. 1994). "Deficient performance which is objectively unreasonable under prevailing professional norms." *Hughes v. Borg*, 898 F.2d 695, 702 (9th Cir. 1990) (citing *Strickland*, 466 U.S. at 688). Prejudice "focusses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhard v. Fretwell*, 113 S.Ct. 838, 844, 122 L.Ed.2d 180 (1993).

In reviewing trial counsel's performance, the court will "strongly presume that counsel's conduct was within the wide range of reasonable assistance, and that he exercised acceptable professional judgment in all significant decisions made." *Hughes v. Borg*, 898 F.2d at 702 (citing *Strickland*, 466 U.S. at 689); *Weygandt v. Ducharms*, 774 F.2d 1491, 1493 (9th Cir. 1985). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judg-

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Cervantes, state they further told the investigator that, to testify, they would need to get off work, if they could.

ments support the limitations on investigation." *Strickland v. Washington*, 466 U.S. at 690-691.

Defense counsel's investigator went to Mexico, prior to the trial, and interviewed four of the proferred witnesses.[6] This shows a reasonable investigation of petitioner's alibi defense. It cannot be said that defense counsel's decision to not call the proferred witnesses to testify for petitioner constitutes deficient performance. The testimony of the proffered witnesses is equivocal and subject to attack as biased.[7] Nor can be said that the defense was prejudiced by trial counsel's decision. The cumulative testimony of Antonio and Jesus Lopez was clear and credible. Both testified that petitioner shot Jesus and Pedro. Jesus had previously identified petitioner at a photographic lineup, and also testified that he had seen petitioner in the bar on prior occasions. Their testimony was not based on split-second observations.

Similarly, Petitioner has not shown that defense counsel's recommendation of a trial by judge, rather than jury, was objectively deficient or unreasonable under prevailing professional norms and that it prejudiced the defense. There

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[6]Petitioner attempts to distinguish between defense counsel and his investigator, asserting that "defense counsel never spoke to any of the potential alibi witnesses." There is no basis for this distinction. The investigator was acting at defense counsel's direction and as his agent. Defense counsel need not personally interview each potential witness to reasonably investigate a defense.

[7]Cf. *In Re Ross*, ___ Cal. 4th ___, 95 WI 263725.

may be myriad reasons an attorney prefers a bench trial to a jury trial.

Petitioner relies on *Sanders v. Ratelle*, 21 F.3d 1446 9th Cir. 1994) to support his claim of ineffective assistance of counsel. In *Sanders*, the court held a criminal defendant did not receive adequate assistance of counsel when counsel failed to perform any investigation concerning an individual who had confessed to the crime of which the defendant was accused. Defense counsel must make a reasonable investigation to enable him/her to make an informed decision about how to best represent his/her client. *Sanders v. Ratelle*, 21 F.3d at 1456. As discussed above, defense counsel conducted a reasonable investigation. At his direction, an investigator visited Mexico and interviewed potential alibi witnesses, including most of the witnesses now proffered by petitioner. There is no evidence that defense counsel failed to interview key witnesses, as petitioner asserts.

Petitioner's claim of ineffective assistance of counsel also criticizes the length of the trial and the time spent in preparation by defense counsel. But the length of the trial reflects the prosecution's decisions as much as defense decisions. And the time spent by trial counsel in preparation is not significant. *See Chambers v. Maroney*, 399 U.S. 42, 54, 26 L.Ed.2d 419, 90 S.Ct. 1925 (1970); *Joseph v. United States*, 321 F.2d 710, 712-713 (9th Cir. 1963); *cert. denied* 375 U.S. 977 (9164); *Spaulding v. United States,* 279 F.2d 65, 66 (9th Cir. 1960), *cert denied*, 364 U.S. 887 (1960). Only what occurs, or does not occur, during the trial is significant. "[To]o satisfy his burden of demonstrating inef-

fective assistance of counsel '[t]he defendant must point to errors or omissions in the record on appeal that establish he did not receive inadequate representation.' " (citation omitted) *United States v. Taylor*, 802 F.2d 1108, 1119 (9th Cir. 1986).

There is no reason to order an evidentiary hearing on petitioner's claim of ineffective assistance of counsel. "[E]ven if petitioner's offered testimony were heard and given full weight in petitioner's behalf, it would still not establish the ineffectiveness and prejudice required by the Strickland standard." *Odle v. Vasquez*, 754 F. Supp. 749, 773 (N.D. Cal. 1990). "[N]o hearing is required if the allegations, 'viewed against the record, either fail to state a claim for relief or are 'so palpably incredible or patently frivolous as to warrant summary dismissal.' *Marrow v. United States*, 772 F.2d 525, 526 (9th Cir. 1985) (Marrow), quoting *United States v. Schaflander*, 743 F.2d 714, 717 (9th Cir. 1984), *cert. denied*, 470 U.S. 1058, 105 S.Ct. 1772, 84 L.Ed.2d 832 (1985)." *Shah v. United States*, 878 F.2d 1156, 1158 (9th Cir. 1989).

2. Waiver of Right to Trial by Jury:

Petitioner's second contention is that he did not make a knowing, voluntary and intelligent waiver of his right to a trial by jury. Petitioner claims that defense counsel never discussed the waiver of a jury with him and never gave him the opportunity to waive the right to a jury trial. (Pet. p.17). This contention is without merit.

The right to a trial by jury is protected by the Constitution. U.S. Const. Art. III, § 2. "Waivers of constitutional rights must not only be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747 (1970). Waiver cannot be inferred from a silent record. There must be "an affirmative showing that [the waiver] was intelligent and voluntary." *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711 (1969).

The record in our case is not silent.[8] It shows that petitioner understood that the choice confronting him was,

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[8]The colloquy concerning petitioner's waiver of his right to a jury trial is, as follows:

THE COURT: Number 9 on the calendar, Cervantes. The interpreter has previously been sworn, Mr. Newman.

[DEFENSE COUNSEL]: Yes, Your Honor. As I understand, we are still ready and willing to waive jury in this matter, and it appears because of logistics problems it would be best to go over to Monday morning to conclude the trial. . . .

THE COURT: All right. Take the waivers.

[PROSECUTOR]: Mr. Cervantes, you are entitled to a jury trial, which is twelve men and women seated in the jury box who would listen to the facts of this case and decide if you are guilty or not guilty. Your attorney says you'd rather have Judge Fratianne hear the case without a jury. Do you understand what I've said to you?

THE DEFENDANT: Yes.

[PROSECUTOR]: Do you want to give up your right to jury trial and have a Court trial with Judge Fratianne?

THE DEFENDANT: Court.

[PROSECUTOR]: Do you give up your right to a jury trial?

on the one hand, to be judged by a group of his "fellow citizens" or, and on the other hand, by a judge. Furthermore, both counsel consented to, and the court approved, petitioner's waiver of the right to a jury. That is all that is required by the Constitution. See *United States v. McCurdy*, 450 F.2d 282 (9th Cir. 1971); *Williams v. DeRobertis*, 715 F.2d 1180, 1183 (7th Cir. 1983), *cert. denied*, 464 U.S. 1072 (1984); *Milone v. Camp*, 22 F.3d 693, 704 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 720 (1995); *Coronado v. Lefevre*, 748 F. Supp. 131 (S.D.N.Y. 1990).

The fact that petitioner may have been following the advice of his attorney in waiving a jury does not make his choice any less knowing or voluntary. "[A] defendant who is aware that the choice he faces as between being judged by a group of his fellow citizens or a judge may conclude intelligently that his lawyer's advice, based upon his experience and his knowledge of law and procedure, is entitled to controlling weight." *William v. DeRobertis*, 715 F.2d at 1183. Therefore, petitioner voluntarily, knowingly, and intelligently waived his right to a jury trial.

For the foregoing reasons, there is no merit to the claims raised by petitioner in the Petition for Writ of Habeas Corpus.

THE DEFENDANT: Yes. What you are saying, that's fine.
[PROSECUTOR]: Counsel join?
[DEFENSE COUNSEL]: Counsel join.
[PROSECUTOR]: People join in the jury waiver.
Reporter's Transcript, pp. 1-2.

RECOMMENDATION

IT IS RECOMMENDED that the Court issue an Order (1) approving and adopting the Report and Recommendation; and (2) directing that judgment be entered denying the petition and dismissing the action with prejudice.

DATE: May 24, 1995

/s/ ROSALYN M. CHAPMAN
ROSALYN M. CHAPMAN
UNITED STATES MAGISTRATE
JUDGE

BEST AVAI

FILED
JAN 18 1996
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
DEPUTY

FILED
JAN 11 1996
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JESUS BOTELLO CERVANTES,

Petitioner-Appellant,

vs.

THEO WHITE, Warden, et al.,

Respondents-Appellees.

No. 95-56637

DC# CV-94-3130-LGB
Central California

ORDER

Before: HALL and BRUNETTI, Circuit Judges

The request for a certificate of probable cause is denied.

LODGED
CLERK, U.S. DISTRICT COURT
JAN 16 1996
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

Clerk of Court
ATTEST
JAN 11 1996
Deputy Clerk

ENTERED
CLERK, U.S. DISTRICT COURT
JAN 22 1996
CENTRAL DISTRICT OF CALIFORNIA
DEPUTY

WAS SERVED BY FIRST CLASS MAIL
PARTIES AT THEIR MOST RECENT
OF RECORD) IN THIS ACTION ON THIS DATE:

DEPUTY CLERK (signed attst mailing)

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